

On November 22, 2019 this Court, consisting of the Honorable Alan G. Davis, the Honorable Cathleen M. Hutchison and the Honorable Michael P. Sherlock, acting as a special court pursuant to 25 Del. C. § 5717(a) convened a trial *de novo* in reference to a Landlord/Tenant Summary Possession petition filed by B.B.R. Investments, LLC (“Plaintiff”), against Carriage Realty Partnership (“Defendant”). Following the receipt of evidence and testimony, the Court reserved decision. This is the Court’s final decision and order.

Procedural and Factual Background

Plaintiff filed a Landlord/Tenant Summary Possession petition with Justice of the Peace Court No. 16 seeking possession and court costs.¹ Plaintiff’s claim is based on Defendant’s failure to pay rent. Trial was held on October 7, 2019 and the Court announced its decision in open Court and subsequently issued its Order entering judgment for the Plaintiff.² Defendant filed a timely appeal of the Court’s Order pursuant to 25 Del. C. § 5717(a). Consequently, trial *de novo* was scheduled.

Plaintiff took title to commercial property located at 242 S. DuPont Boulevard, Smyrna, Delaware on October 29, 2018 as a result of a sheriff’s sale and became the landlord under a lease agreement between All-Tech Automotive, Inc. (“All-Tech”) and Defendant dated July 20, 1999. The annual rent under the lease is \$10.00. In addition, Defendant is responsible for 40% of the taxes to Kent County and the Town of Smyrna as additional rent.

Defendant (or Defendant’s principal) had previously owned the property and sold it to All-Tech. That original sale had been intended to convey only a portion of the property, because Defendant maintained a lease agreement with an auto repair shop and a cell phone tower. However, at the time of the sale, it was concluded that the intent of the parties was not going to be achieved, so they entered into a sale for the entire property with a lease back of the portion on which Defendant’s tenants are situated. That lease is the one under which the parties continue to operate.

¹ The alleged demand amount in the “Notice of Default” exceeds the jurisdictional limit of this Court.

² *B.B.R. Investments v. Carriage Realty Partnership*, Del. J.P., C.A. No. JP16-19-005654, Dillard, J. (Oct. 8, 2019).

At some point All-Tech sold the property to Aslam, LLC. The principal of that company was a doctor, who is now serving a prison sentence for fraud. It was during this period of time that the taxes began to fall behind significantly. The situation was so serious, in fact, that the cell tower tenant took matters into its own hands and convinced the Kent County assessment office to split the parcel into two tax parcels so that its interest would not be impeded by the tax issues. There is evidence that the cell tower company not only took this step but made arrangements for full payment of the taxes at some point.

Eventually Aslam, LLC defaulted on its mortgage, causing the sale of the property to the current Plaintiff.

Positions of the Parties

Plaintiff contends that Defendant has defaulted on its obligations under the lease by failing to pay its proportional share of taxes to Kent County in the amount of \$18,750.20 and the Town of Smyrna in the amount of \$9,435.64. In addition, Plaintiff contends that Defendant has failed to pay its annual rental obligation since 1999 and currently owes \$210.00 in unpaid annual rent. Plaintiff sent a 5-day notice by Certificate of Mailing and Certified Mail Receipt demanding that the Defendant pay the total amount of \$28,395.84 or submit evidence of prior payment of the taxes.

Defendant contends that the taxes were paid and produced numerous exhibits showing that the taxes were paid by Cellular Tower and that Defendant provided a rent abatement to Cellular Tower for the payments. Additionally, Defendant contends that All-Tech and Aslam, LLC accepted payments, but did not pay the taxes. Defendant also contends that the \$10 annual rent is a nominal amount, and that at various points over the lease period checks were remitted for the rental amount but never cashed.

Discussion and Findings

This is a commercial landlord/tenant case where Plaintiff seeks possession of certain real property located at 242 S. DuPont Boulevard, Smyrna, Delaware. Summary possession of any commercial rental unit is governed by general contract principles, Chapter 57 and Part IV of Title 25 of the Delaware Code.³ The lease agreement does not

³ 25 Del. C. § 5101(b).

include a default provision. While the contract contains a “Notice” provision, the contract is silent concerning a timeframe in which to remedy any default.

Plaintiff’s notice dated August 1, 2019 informs Defendant that the total outstanding amount of annual rent and taxes is \$28,395.84.⁴ The letter reads in part, “This is your notice that Carriage Realty Partnership has five days to reimburse to B.B.R. Investments, LLC for past due taxes or submit tax receipts and to pay to B.B.R. Investments, LLC the past due annual rent described above.” The letter does not include an itemization or breakdown of the tax amount or tax year owed for Kent County or the Town of Smyrna nor could Plaintiff provide testimony of the breakdown at trial. Essentially, the Plaintiff took the full amount due, calculated 40% and used that amount in its demand. While the Court is understanding of the fact that, as a subsequent purchaser coming into this situation, it would be difficult to know what is the exact amount due. The Court gives credit to Plaintiff providing an opportunity for the Defendant to show proof of payment as part of the demand, however, it is clear from the testimony and the records introduced at trial that the requested proof would have been difficult to develop in five days as demanded.

Plaintiff’s confusion is anticipated by the statutory provisions dealing with property acquired pursuant to execution process. 10 *Del. C.* § 4978(a) states in part, “In any case of sale, the purchaser shall be entitled to rent for the premises sold from the day of sale.” It is undisputed that Plaintiff acquired the property by Sheriff’s Deed. The Court finds that this statute applies. It is also clear that the payment of the taxes under the lease is to be considered “additional rent.” Therefore, Plaintiff’s demand notice inflated the balance owed and is not reasonable notification in amount or opportunity to cure.

Based on the foregoing, Plaintiff has not proven their case by a preponderance of the evidence and is barred from demanding rent in excess of that accrued since the date of acquisition.

⁴ Plaintiff’s Exhibit 5.

Conclusion

Therefore, the panel finds by unanimous verdict in favor of the Defendant Carriage Realty Partnership and against Plaintiff B.B.R. Investments, LLC.

IT IS SO ORDERED, this 4th day of December, 2019.

For the Court,

/s/ Cathleen M. Hutchison (SEAL)
Cathleen M. Hutchison

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